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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Anthony Espinosa,
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No. CV-15-00324-TUC-CKJ (BGM)

10 Plaintiff,

11 **REPORT AND RECOMMENDATION**

12 v.

13 Loretta Lynch, Attorney General, United
14 States Department of Justice; John and
Jane Does 1–10; and ABC Governmental
15 Entities 1–10,

16 Defendants.

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18 Currently pending before the Court is the Government's Motion to Dismiss First
19 Amended Complaint (Doc. 21). Plaintiff filed his opposition (Doc. 22), and the
20 Government replied (Doc. 23). As such, the motion is fully briefed and ripe for
21 adjudication.

22 Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure, this matter
23 was referred to Magistrate Judge Macdonald for Report and Recommendation. On
24 November 21, 2016, oral argument was held before the Honorable Bruce G. Macdonald.
25 Minute Entry 11/21/2016 (Doc. 27). The matter is ripe for review. The Magistrate Judge
26 recommends that the District Court grant the Government's motion to dismiss (Doc. 21).
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1 **I. FACTUAL BACKGROUND**

2 On or about July 10, 2012, the Department of Homeland Security Office of
3 Inspector General (“DHS OIG”) Joint Intake Center received a referral from Customs and
4 Border Protection Internal Affairs regarding Plaintiff. First Amended Compl. (“FAC”)
5 (Doc. 18) at ¶ 10. The referral was based on an allegation made by the United States
6 Drug Enforcement Administration (“DEA”), Office of Professional Responsibility
7 (“OPR”), which alleged possible corruption involving Plaintiff based on his alleged
8 association with Sandra Campana. *Id.* at ¶ 11. Sandra Campana was alleged member of
9 a narcotics trafficking organization under investigation by the DEA. *Id.* at ¶ 12. Plaintiff
10 was a Lead Border Patrol Agent for the United States Border Patrol (“USBP”) stationed
11 at the Willcox Border Patrol Station in Willcox, Arizona. *Id.* at ¶ 13.

12 On November 19, 2012, during a compelled DHS OIG interview, Plaintiff stated
13 that he had been in an on-and-off relationship with Ms. Campana for three (3) years.
14 FAC (Doc. 18) at ¶ 14. Plaintiff was unaware of Ms. Campana’s criminal associations
15 and never attempted to conceal his relationship with her. *Id.* at ¶ 15. On November 22,
16 2012 DHS OIG requested a copy of Plaintiff’s February 1, 2012, Electronic
17 Questionnaire for Investigative Purposes (“e-QIP”). *Id.* at ¶ 16. The e-QIP System is a
18 computer-generated username and password protected system unique to government
19 employees with security clearances, used to submit personal information for background
20 investigations during pre-employment and periodic re-investigations required every five
21 years. *Id.* at ¶ 17. Plaintiff stated that he did not have continuing contact with foreign
22 nationals, because at the time he was not involved with Ms. Campana. *Id.* at ¶ 20. On
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1 November 26, 2012, DHS OIG presented a case for prosecution against Plaintiff to the
2 United States Attorney's Office ("USAO") for a violation of 18 U.S.C. § 1001. *Id.* at ¶
3 21. The USAO declined prosecution. *Id.*

5 On December 10, 2012, United States Attorney for the District of Arizona John
6 Leonardo sent a *Giglio* letter to the head of the Agency's Tucson Sector regarding
7 Plaintiff. FAC (Doc. 18) at ¶ 22. The USAO notified the Agency that in light of
8 Plaintiff's relationship with Ms. Campana, it would no longer be using Plaintiff "as a
9 government witness in any criminal prosecution." *Id.* at ¶ 24. Plaintiff asserts that the
10 USAO never gave him notice that it was considering a *Giglio* letter and never gave him
11 an opportunity to respond to the allegations against him, or review the materials it relied
12 upon. *Id.* at ¶ 26.

15 On April 24, 2013, the Agency presented Plaintiff with a letter proposing his
16 removal from Federal service. FAC (Doc. 18) at ¶ 27. The only charge in the letter
17 proposing removal was the "Inability to Perform the Full and Unrestricted Duties of a
18 Border Patrol Agent," based solely on the USAO's *Giglio* letter. *Id.* at ¶ 28. Plaintiff
19 sought disclosure of DHS OIG's investigation file in its entirety and disclosure of all
20 witness interviews and internal memoranda regarding the DHS OIG investigation. *Id.* at
21 ¶ 29. This request was denied. *Id.* at ¶ 30.

24 Plaintiff was transferred to the position of Mission Support Specialist, a non-law
25 enforcement position. FAC (Doc. 18) at ¶ 33. Plaintiff alleges the sole reason for this
26 demotion was the *Giglio* letter. *Id.* at ¶ 35. On February 18, 2016, Plaintiff Anthony
27 Espinosa filed his First Amended Complaint ("FAC") (Doc. 18) against the Attorney
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1 General of the United States, Loretta Lynch and the Department of Justice. *See* FAC
2 (Doc. 18). Plaintiff alleges violation of his Due Process rights pursuant to the Fifth
3 Amendment including 1) deprivation of a property interest in employment; 2) deprivation
4 of liberty interest; and 3) deprivation of a property interest in loss of benefits. FAC (Doc.
5 18) ¶¶ 38–56.

9 **II. STANDARD OF REVIEW**

10 A complaint is to contain a “short and plain statement of the claim showing that
11 the pleader is entitled to relief[.]” Rule 8(a), Fed. R. Civ. P. While Rule 8 does not
12 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
13 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct.
14 1937, 1949, 173 L.Ed.2d 868 (2009). “Threadbare recitals of the elements of a cause of
15 action, supported by mere conclusory statements, do not suffice.” *Id.*; *Pareto v. Fed.*
16 *Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998) (“conclusory allegations of law and
17 unwarranted inferences are not sufficient to defeat a motion to dismiss.”).

18 Dismissal is appropriate where a plaintiff has failed to “state a claim upon which
19 relief can be granted.” Rule 12(b)(6), Fed. R. Civ. P. “To survive a motion to dismiss, a
20 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
21 relief that is plausible on its face.’” *Ashcroft*, 556 U.S. at 678, 129 S.Ct. at 1949 (quoting
22 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d
23 929 (2007)). Further, “[a] claim has facial plausibility when the plaintiff pleads factual
24 content that allows the court to draw the reasonable inference that the defendant is liable
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1 for the misconduct alleged. The plausibility standard is not akin to a ‘probability
2 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
3 unlawfully.” *Id.* (citations omitted).

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5 “When ruling on a motion to dismiss, [the Court must] accept all factual
6 allegations in the complaint as true and construe the pleadings in the light most favorable
7 to the nonmoving party.” *Association for Los Angeles Deputy Sheriffs v. County of Los*
8 *Angeles*, 648 F.3d 986, 991 (9th Cir. 2011) (quoting *Knivele v. ESPN*, 393 F.3d 1068,
9 1072 (9th Cir. 2005)). “The court draws all reasonable inferences in favor of the
10 plaintiff.” *Id.* (citing *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043
11 n.2 (9th Cir. 2008)). This Court is not required, however, to accept conclusory
12 statements as a factual basis. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127
13 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007); *Mann v. City of Tucson*, 782 F.2d 790, 793
14 (9th Cir. 1986) (“Although we must, in general, accept the facts alleged in the complaint
15 as true, wholly vague and conclusory allegations are not sufficient to withstand a motion
16 to dismiss.”).

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III. ANALYSIS

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23 The Government urges that Plaintiff does not possess a protected property or
24 liberty interest, and as such cannot have a due process right regarding the same. *See*
25 Govt.’s Mot. to Dismiss FAC (Doc. 21); Govt.’s Reply (Doc. 23). Plaintiff objects,
26 arguing that he was entitled to notice and the opportunity to be heard prior to the decision
27 to issue a *Giglio* letter. *See* Pl.’s Response (Doc. 22) at 4–6.

1 A. ***Substantive Rights***
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34 **1. Property Interests**
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7 Plaintiff asserts that he “has a property interest protected by the Due Process
8 Clause of the Fifth and Fourteenth Amendments for the United States Constitution to be
9 free to pursue his career as a Lead Border Patrol Agent with [United States Border
10 Patrol].” FAC (Doc. 18) at ¶ 39. Plaintiff further asserts that he had “a fundamental right
11 to be heard at a meaningful time and in a meaningful manner before being deprived of
12 this statutorily-created property interest under the Due Process Clause of the Fifth
13 Amendment[,]” and that “Plaintiff’s demotion to Mission Support Specialist, a non-law
14 enforcement position, was a violation” of those rights. *Id.* at ¶¶ 40–41. Plaintiff also
15 asserts “a property interest protected by the Due Process Clause of the Fifth Amendment
16 of the United States Constitution to receive and continue to receive the compensation and
17 benefits to which he would otherwise have been entitled, including his salary as a Lead
18 Border Patrol Agent[,] . . . as well as the immediate retirement annuity provided to law
19 enforcement agents[.]” *Id.* at ¶ 51. Plaintiff argues that “[t]he denial of [his] right to
20 clear his name by challenging or disputing the underlying DHS OIG investigation or the
21 USAO’s decision to issue the *Giglio* letter deprived Plaintiff of these benefits in violation
22 of his due process rights under the Fifth Amendment.” *Id.* at ¶ 54.

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24 As an initial matter, the Government correctly states that “the USAO was not
25 Plaintiff’s employer,” and as such, “his allegations concerning his demotion and any
26 accompanying benefits are irrelevant, as the USAO was not involved in any such
27 decisions and Plaintiff has received the full process to which he was entitled on those

1 claims.” Def.’s MTD (Doc. 21) at 3. As such, any process that was due regarding the
2 status of Plaintiff’s employment should have come from his employer, not the USAO.
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4 At oral argument, Plaintiff’s counsel clarified his client’s position that this case
5 takes place in the space before the decision to issue a *Giglio* letter is made, and argued
6 that the USAO has an obligation to notify an employee regarding the *possibility* of the
7 issuance of a *Giglio* letter and give the employee an opportunity to be heard. “To have a
8 property interest in a benefit, [however,] a person clearly must have more than an abstract
9 need or desire and more than a unilateral expectation of it. He must, instead, have a
10 legitimate claim of entitlement to it.” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S.
11 748, 756, 125 S.Ct. 2796, 2803, 162 L.Ed.2d 658 (2005) (internal quotations and
12 citations omitted). The Supreme Court of the United States has noted that its “cases
13 recognize that a benefit is not a protected entitlement if government officials may grant or
14 deny it in their discretion.” *Id.* (citations omitted). As discussed in Section III.B., *infra*,
15 Plaintiff was not entitled to any due process protection prior to or surrounding the
16 USAO’s decision to issue a *Giglio* letter, as this decision was entirely within the USAO’s
17 discretion.
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22 **2. Liberty Interest**

23 Plaintiff asserts that he possesses “a liberty interest protected by the Due Process
24 Clause of the Fifth Amendment of the United States Constitution to be free from false
25 charges made under color of law which involved or implied personal or professional
26 dishonesty, immorality or malfeasance in office, or which adversely reflected on or
27 damaged his career and future in his employment with [United States Border Patrol].”
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1 FAC at ¶ 45. Plaintiff further alleges that “[t]he denial of Plaintiff’s right to clear his
 2 name by challenging or disputing the underlying DHS OIG investigation or the USAO’s
 3 decision to issue the *Giglio* letter was a violation of Plaintiff’s due process rights under
 4 the Fifth Amendment.” *Id.* at ¶ 47. Plaintiff charges that “Defendant abrogated this duty
 5 by allowing the United States Attorney’s Office to issue *Giglio* letters without any
 6 process, and as such her actions directly caused the deprivation of Plaintiff’s liberty
 7 interest.” *Id.* at ¶ 49.

8 As noted, *supra*, “a benefit is not a protected entitlement if government officials
 9 may grant or deny it in their discretion.” *Town of Castle Rock, Colo.*, 545 U.S. at 756,
 10 125 S.Ct. at 2803 (citations omitted). Moreover, as discussed in Section III.B., *infra*,
 11 Plaintiff was not entitled to any due process protection prior to or surrounding the
 12 USAO’s decision to issue a *Giglio* letter, as this decision was entirely within its
 13 discretion.

14 **3. *Loudermill* Distinguished**

15 Plaintiff’s further contention that his right to testify is inextricably intertwined
 16 with his position as a Border Patrol Agent, such that due process must attach is similarly
 17 without merit. Pl.’s Response (Doc. 22) at 3–5. Plaintiff relies on *Cleveland Board of*
 18 *Education v. Loudermill*, 479 U.S. 432, 452 (1985), urging “that a deprivation of property
 19 must ‘be preceded by notice and opportunity for hearing appropriate to the nature of the
 20 case.’” Pl.’s Response (Doc. 22) at 4. This argument is rooted in Plaintiff’s argument
 21 that his right to testify is so intertwined with his right to employment that it constitutes a
 22 property and/or liberty interest. *See id.* at 4–6.

1 Due Process “requires ‘some kind of hearing’ prior to the discharge of an
 2 employee who has a constitutionally protected property interest in his employment.”
 3 *Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493 (citing *Board of Regents v. Roth*, 408 U.S.
 4 at 569–70, 92 S.Ct. at 2705; *Perry v. Sindermann*, 408 U.S. 593, 599, 92 S.Ct. 2694,
 5 2698, 33 L.Ed.2d 570 (1972)). It was undisputed that the *Loudermill* respondents had a
 6 property interest in their public employment. *Loudermill*, 470 U.S. at 538, 105 S.Ct. at
 7 1491. As such, the Supreme Court held that before the loss of any property interest in
 8 respondents’ public employment, due process required a pretermination opportunity to
 9 respond. *Id.* at 548–49, 105 S.Ct. at 1496.

10 “[T]he requirements of due process[, however,] do not apply unless [Plaintiff] can
 11 first show that [he] has a cognizable liberty or property interest[.]” *Dorfmont v. Brown*,
 12 913 F.2d 1399, 1403 (9th Cir. 1990) (citing *Board of Regents of State Colleges v. Roth*,
 13 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972)). “Where there is no
 14 right, no process is due under the Constitution.” *Id.* (citations omitted). “Property
 15 interests . . . are not created by the Constitution. Rather they are created and their
 16 dimensions are defined by existing rules or understandings that stem from an independent
 17 source[.]” *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709.

18 Consistent with these principles, the Ninth Circuit Court of Appeals in *Dorfmont*
 19 recognized that there is no entitlement to a security clearance, and “no right to maintain a
 20 security clearance and no entitlement to continued employment at a job that requires a
 21 security clearance.” *Dorfmont*, 913 F.2d at 1404. The court noted that Ms. Dorfmont
 22 “ha[d] not been deprived of the right to earn a living[,] she ha[d] only been denied the

1 ability to pursue employment requiring a Defense Department security clearance.” *Id.* at
 2 1403. Without a “protected interest in a security clearance, there is no liberty interest in
 3 employment requiring such clearance.” *Id.* As such, Ms. Dorfmont could “not
 4 establish[] a cognizable liberty or property interest and therefore [was] not entitled to
 5 constitutional due process protection.” *Id.*

7 Plaintiff asserts that his case is distinguishable from *Dorfmont*, because she was a
 8 private employee seeking a security clearance, whereas he is a public employee which in
 9 and of itself is a protected property right. Pl.’s Response (Doc. 22) at 6–7. Plaintiff
 10 further argues that Ms. Dorfmont “was given a meaningful opportunity to respond to the
 11 allegations that led to the revocation of her security clearance.” *Id.* at 6. Prior to removal
 12 from his position as a Lead Border Patrol Agent, Plaintiff submitted a written response to
 13 the proposed removal and participated in an oral reply. FAC (Doc. 18) at ¶ 34. This was
 14 the process due him pursuant to *Loudermill*. Despite Plaintiff’s assertion to the contrary,
 15 there is no constitutional right to testify, nor is such a right inextricably intertwined with
 16 his position as a Border Patrol Agent. Accordingly, Plaintiff cannot “establish[] a
 17 cognizable liberty or property interest and therefore is not entitled to constitutional due
 18 process protection.” *Dorfmont*, 913 F.2d at 1404.

23 ***B. Prosecutorial Discretion***

24 **1. Absolute Immunity**

26 It is well established law “that a prosecutor has absolute immunity for the decision
 27 to prosecute[.]” *Roe v. City and County of San Francisco*, 109 F.3d 578, 583 (9th Cir.
 28 1997) (citing *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547

1 (1991); *Fletcher v. Kalina*, 93 F.3d 653, 654 (9th Cir. 1996)). The Ninth Circuit Court of
2 Appeals has further held that prosecutors are entitled to absolute immunity for the
3 decision not to prosecute. *Id.* at 583. In *Roe*, a California Police Officer brought suit
4 pursuant to § 1983 because the District Attorney refused to file cases in which Officer
5 Roe was the arresting officer without corroborating evidence. *Id.* at 582. The *Roe* court
6 observed that “[j]ust as a prosecutor’s professional evaluation of the evidence assembled
7 by the police is entitled to absolute immunity, . . . a prosecutor’s professional evaluation
8 of a witness is entitled to absolute immunity even if that judgment is harsh, unfair or
9 clouded by personal animus[.]” *Id.* at 584 (internal citations omitted); *see also Botello v.*
10 *Gammick*, 413 F.3d 971, 976 (9th Cir. 2005). “Whether [the prosecutor’s] assessment is
11 accurate or not is immaterial. This kind of witness evaluation falls entirely within a
12 prosecutor’s judicial function regardless of whether one case or a line of cases is at
13 issue.” *Roe*, 109 F.3d at 584. Accordingly, a prosecutor’s “decision not to prosecute
14 [Plaintiff’s] cases and their communication of that decision is intimately tied to the
15 judicial process and is thus entitled to absolute immunity.” *Botello*, 413 F.3d at 977.

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28 Here, Plaintiff seeks relief for the USAO’s failure to include him in the decision-making process to issue a *Giglio* letter. “The decision to place [Plaintiff] on the *Brady* list and to communicate that decision, however, were acts for which the[] Defendant[] ha[s] absolute immunity.” *Walters v. County of Maricopa, Ariz.*, 2006 WL 2456173, *9 (D. Ariz. 2006). “[H]ere we face an individualized judgment regarding whether the presence of a particular [Border Patrol Agent] as investigating officer or otherwise as a witness would burden or compromise the prosecution’s cases. The judgment may be

1 wrongheaded, but it is the prosecutor's to make free from damage actions or injunctive
 2 oversight in the federal court." *Harrington v. Almy*, 977 F.2d 37, 42 (1st Cir. 1992).
 3 Accordingly, Plaintiff has failed to state a claim for relief.
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5 **2. Separation of Powers**

6 "Prosecutorial charging . . . decisions are particularly ill-suited for broad judicial
 7 oversight." *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 9th Cir. 1992).
 8 Moreover, the separation of powers doctrine demands judicial respect for the
 9 independence of the prosecutor. *See United States v. Sears, Roebuck & Co., Inc.*, 719
 10 F.2d 1386, 1391 (9th Cir. 1983); *see also Roe*, 109 F.3d at 586 ("[A]s a general principle,
 11 'the separation of powers proscribes a judicial direction that a prosecutor commence a
 12 particular prosecution.'" (quoting *Harrington*, 977 F.2d at 41)). "It would raise serious
 13 separation of powers questions . . . for the district court to inquire into and supervise the
 14 inner workings of the United States Attorney's Office." *Redondo-Lemos*, 955 F.2d at
 15 1299 (citations omitted). "The Office of the United States Attorney cannot function as
 16 prosecutor before the court while also serving under its general supervision." *Id.* at 1300.
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18 The separation of powers doctrine dictates that the USAO's charging decisions are
 19 wholly within its discretion. Although this Court may arguably review a constitutional
 20 challenge to actions taken by the USAO, Plaintiff has not demonstrated a cognizable
 21 property or liberty interest in the right to testify which would thereby entitle him to due
 22 process. *See Redondo-Lemos*, 955 F.2d at 1300; *Dorfmont*, 913 F.2d at 1405
 23 (concurrence). Accordingly, the Court finds that judicial review of the USAO's decision-
 24 making process to issue a *Giglio* letter is inappropriate in this case.
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1 ***C. Leave to Amend***

2 The Government seeks dismissal of Plaintiff's FAC without leave to amend.
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4 Def.'s Mot. to Dismiss FAC (Doc. 21). "Dismissal without leave to amend is improper
5 unless it is clear, upon de novo review, that the complaint could not be saved by any
6 amendment." *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (citations
7 omitted). Here, the Plaintiff has already amended his Complaint once, and the Court
8 finds that there is no set of facts that could cure the deficiencies found in Plaintiff's First
9 Amended Complaint.

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12 **IV. CONCLUSION**

13 Based upon the foregoing, the Court finds that Plaintiff has failed to demonstrate a
14 constitutional property and/or liberty interest entitling him to due process protection.
15 Furthermore, the USAO's decision to send Plaintiff a *Giglio* letter is intimately tied to the
16 judicial process, and as such, prosecutors are absolutely immune from suit. *See Botello*,
17 413 F.3d at 977.

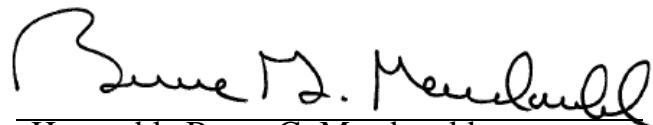
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20 **V. RECOMMENDATION**

21 For the reasons delineated above, the Magistrate Judge recommends that the
22 District Judge enter an order GRANTING the Government's Motion to Dismiss
23 Plaintiff's First Amended Complaint (Doc. 18) without leave to amend.

24 Pursuant to 28 U.S.C. §636(b) and Rule 72(b)(2) of the Federal Rules of Civil
25 Procedure, any party may serve and file written objections within fourteen (14) days after

1 being served with a copy of this Report and Recommendation. A party may respond to
2 another party's objections within fourteen (14) days after being served with a copy. Fed.
3 R. Civ. P. 72(b)(2). If objections are not timely filed, they may be deemed waived. If
4 objections are filed, the parties should use the following case number: **CV-15-0324-**
5 **TUC-CKJ.**

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7 Dated this 20th day of January, 2017.
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10 Honorable Bruce G. Macdonald
11 United States Magistrate Judge
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